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LIABILITY OF RAILROAD COMPANIES FOR NEGLIGENTLY CAUSED FIRES.

It was at one time supposed that in proceedings for the acquisition, by a railroad company, of a right of way over X's land, the effect on the value of X's land not taken of the danger of fire arising from the proximity of the proposed tracks to buildings, could not be considered in estimating X's damages. In one case[1] it was held improper to permit the plaintiff to "show the proximity of his house and belongings to the railroad; to show that there was danger that the same might be set on fire by sparks from the locomotives; for the purpose of claiming damages by reason of the diminution in value of his property on account of such danger." The previous year, 1856, the same Judge, Lowrie J, held[2] that railroad companies are liable at common law for damages done by negligently caused fires, and therefore, in assessing damages for the taking of land, no compensation for such damage is allowed. He then proceeded to consider the question "Must they make compensation in advance for the risk of fires not covered by this rule?" i.e., for the risk of non-negligent fires. He decided that no compensation for the risk of such fires could be allowed, because it is impossible to measure this risk, "Who," he asked, "can calculate the chances of accidental fires? We know not yet the kind of fuel that may be used; nor the improvements to be made for preventing the emission of sparks; nor how soon there will be another element than fire or steam for locomotive power, nor whether there will be one or one hundred locomotives daily along the road." The jury had allowed

[1]Lehigh Valley R. R. v. Lazarus, 28 Pa. 203.
[2]Sunbury etc. R. R. v. Hummell, 27 Pa. 99.

inter alia $1,000 for damages that might happen from fire to the barn. This portion of the damages the Supreme Court set aside, not because the damage for possible and probable fires was not properly estimated, but because no damages at all for possible and probable fires could be allowed.

LIABILITY FOR NON-NEGLIGENT FIRES IN MODERN CASES.

The doctrine of the earlier cases has been rejected by the later. We say "rejected," despite the attempt occasionally made[3] to deny any such repudiation. The recent doctrine is that the risk of fire arising without culpability may be considered in so far as it impairs the market value of the premises[4] and for this reason there is no liability in a common law action, for damages springing from non-culpable fires that actually occur.

CAUSATION OF THE FIRE.

There is no liability for fires, on the part of a railroad company unless the agents of such company have caused it. If it is alleged that the fire was caused by sparks from an engine, the fact that there were such sparks, and that they originated the fire must be made to appear[5]. But it is not necessary that any witness should say that he saw a spark emerge from the stack of the engine, fall upon combustible material, and inflame that material. The proof of the causal relation between the fire and an engine of the defendant may be, as it generally is, wholly circumstantial[6] and, the evidence on that point being sufficient to submit to the jury, the jury must determine whether the fire was or was not caused by the defendant[7]. Proof of the causation by direct evidence is usually impracticable[8]. The fact that there was no fire visible before the passing of a train; that shortly after the passing of a train, a fire was seen[9] that the locomotive

[3]Wilmington etc. R. R. v. Stauffer, 60 Pa. 374.

[4]Hoffman v. Bloomsburg etc. R. R., 143 Pa. 503; 5 P. & L. Dig. 8171.

[5]Henderson v. Pa. R. R. 144 Pa. 461; P. & R. R. v. Hendrickson 80 Pa. 182.

[6]R. R. v. Yeiser, 8 Pa. 366; Elder Township School District v. Penna. R. R. 26 Super 112; Lackawanna etc. R. R. v. Doak, 52 Pa.; 379 Henderson v. P. & R. R. R. 144 Pa. 461; Matthews v. Pittsburg etc. R. R. 18 Super 10; P. & R. R. R. v. Hendrickson, 80 Pa. 182; Albert v. Northern Central R. R. 98 Pa. 316; L. & B. R. R. v. Doak, 52 Pa. 379; F. & B. Turnpike Co. v. Pila. & T. R. R. 54 Pa. 345; Wilson v. Phila. etc. & R. R. 9 Del. 505.

[7]Penna. R. R. v. Kerr, 62 Pa. 353.

[8]Stephenson v. Penna. R. R. 20 Super 157.

[9]Gowen v. Glaser, 2 Sadler 250 Pa.; Com. v. Watson, 81½ Pa. 293.

was throwing out sparks, that these sparks were causing fires in grass, brushwood, fences, etc. along the route in proximity to the place where the fire in question was[10]; these or other facts may warrant the inference that the locomotives caused the fire. In one case[11] the burning of a barn, occurring between two and three o'clock p. m. was referred by the jury to a train which passed about noon. In a case in which the distance of the place of origin of the fire, viz. a barn, from the railroad was considerable, say 150 feet, it was shown, in order to persuade the jury that one of these trains caused the fire, that the engines passing about the time of the origin, were emitting cinders, smoke and sparks; that the wind was blowing from the tracks toward the barn. The witnesses were allowed to state the effect of wind upon smoke coming from a locomotive; and how far they had known sparks to be carried, without specifying the conditions of such carriage, and showing their similarily to those of the day in question[12]. The jury must be satisfied that the fire was caused by the defendant's locomotives[13]. Rags in a field having been burnt, it may be shown that what remained of them were afterwards spread out on the field, and watched day and night, and that they were repeatedly set on fire by engines passing on the road[14].

CAUSATION NEGATIVED.

The want of causal relation between a certain locomotive and the fire may be indicated by the fact that the fire was under way while the train was passing and before the train could, probably, have caused it[15]. The defendant may show that another railroad is contiguous to the site of the fire, and that an engine on it may have caused the fire. The jury would decide whether such engine rather than one of the defendant's, in fact caused it[16]. In a suit for the destruction of a dwelling house, the defendant attempted to show that the fire originated in the garret, and not from sparks emanating from its locomotives[17].

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[10]Pa. R. R. v. Hendrickson 80 Pa. 182.
[11]Penna. R. R. v. Stranahan, 79 Pa. 405.
[12]Pa. R. R. v. Page,. 21 W. N. 52 Reversed for another reason.
[13]Gowen v. Glase, 2 Sadler, 250.
[14]Gowen v. Glaser, 2 Sadler, 250.
[15]Pa. Com. v. Watson, 81 Pa. 293.
[16]Lehigh Valley R. R.. v. McKeen, 90 Pa. 122.
[17]Phila. etc. R. R. v. Yeager, 73 Pa. 121.

PROXIMATENESS OF EFFECT.

It is not enough that the evidence convinces the jury that the engine of the defendant was the cause of the fire. *Causa proxima, non remota, spectatur.* Event *a* may be caused by event *b*, plus *c*, and *d* and *e*, and *b* may be deemed too "remote" to be considered jurally as the cause. It might be expected that the conception of proximateness being necessarily vague, the tests of it are uncertain, and the results of their application inconsistent. We are told by Thompson, C. J.,[18] that the distance in time or space, between the cause and the effect, is not the criterion. "The maxim (*causa proxima*, etc.,) however," he remarks, "is not to be controlled by time or distance, but by succession of events," a phrase which piques the curiosity without satisfying it. The Chief Justice illustrates thus: A carelessly uses a match. It sets fire to the house in which it is thus used. That house fired, fires a second; the second a third, etc. "The second and third houses," he observes, "in the case supposed, were not burned by the direct action of the match, and who knows how many agencies might have contributed to produce the result. Therefore it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done." But, did the man who carelessly used the match, burn the first house? He ignited, let us say, the phosphorus tip of the match. It heated the contiguous part of the match, but that part would not have burned, but for the presence of oxygen, and for its avidity for carbon. The combustion of this part, heated the next part with which the atmospheric oxygen combined, consuming it. This part heated the next part. Finally, enough heat was supplied by the burning match, to a spot of the floor of the house to cause the oxygen of the air to combine with it; and burn it. This spot burning, raised the temperature of adjacent spots, which likewise were burned. The heat caused by the consumption of one story, extended to the other storys, till the roof was reached. Then the heat extended to the next house, and then to the next, etc. Let us suppose that the houses are not contiguous. Nevertheless the heat from the first burning house muse be carried to the next, in order to inflame it. How can it matter whether the heat passes through empty space, or ether, or whether it is carried by conduction?

[18]Pa. R. R. v. Kerr, 62 Pa. 353, Heverly v. State Line. R. 135 Pa. 50; Hoag v. Lake Shore, etc. R. R. 85 Pa. 293.

There is no single cause of any thing. "Every incident" truthfully said Wardlaw J.[19], "will, when carefully examined, be found to be the result of combined causes" and these causes may work not simultaneously merely but also successively. Facts *a* and *b* acting simultaneously, cause *c*. Fact *c* finds fact *d* in simultaneous existence, and, together, they produce *e*. Fact *e* finds fact *f* in existence and they generate fact *h*. Let us suppose the ordinary case: Corporation A negligently omits to put in the stack of the engine, a spark arrester. That is a mere negation, an omission. A fire is kindled in the engine. It makes a draft, the draft violently casts out a spark, the wind seizes the spark and carries it to a neighboring house, setting fire to it. The combustion of the coal heats the air. It rises and colder air rushes in. This air bears aloft heated coals. These are swept by the wind in this direction rather than in a hundred other directions. Has the corporation caused the emission of the sparks, or their being borne to the house which is ignited by them? Yes, but only because it has caused the ignition of the coal, and the inrush of air and has not presented to the outrushing sparks an obstacle. Has it caused the burning of X's house? Yes, but only because it did an act or omitted to do an act which has been followed by 50 or 100 separable phenomena, the last of which is the fire.

NATURAL AND PROBABLE CONSEQUENCE.

Proximateness in time or space, or with respect to the number of phenomena lying between the terms, proving an unsatisfactory test, another is frequently invoked. "In all or nearly all cases" says Agnew J., "the rule for determining what is a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances.[20] The jury," he adds, "must determine whether the original cause,

[19]Harrison v. Barkley, 1 Strobh, 548, quoted by Thompson C. J.

[20]Pa. R. R: v. Hope, 86 Pa. 373; Haverly v. State Line R.R., 135 Pa. 50. It was said that the defendant was responsible, if the burning of lumber was tha natural and probable consequence of the setting fire to a stump, a consequence which "ought to have been foreseen by the defendant in the light of attending circumstances," viz; the character of the season, the effect of wind,, the combustible nature of the stump,' its proximity to other combustible substances, and to the property consumed. Haverly vs. State Line R. R. 135 Pa. 50.

that is the negligence, is, by continuous operation so linked to each successive fact as that all may be said to be one continuous operating succession of events, in which the first became naturally linked to the last, and to be its cause, and thus to be within the probable forsight of him whose negligence ran through the succession to the injury." The jury is to "take up the successive facts" and it "ascertains whether they are naturally and probably related to each other by a continuous sequence, or are broken off or separated by a new and independent cause." No spark arrester is in the smoke stack. A spark escapes. It fires a house 50 feet distant from the track. Had it not escaped no fire. Had there been a spark arrester, no escape of the spark. Shall we say that the absence of the arrester was a cause of the fire? If it was it was the natural cause. A supernatural, preternatural, un-natural cause is not to be thought of. It is not necessary that the absence of the arrester should be the *sole* cause. A sole cause is impossible. The absence of arrester co-operated with the draft. The combustibility of the materials of the house, co-operated with the heat carried by the spark. It may be safely said, that in its proper sense, the word "natural" describes no available test of responsible causal relation.

CO-OPERATION OF ACTS OF OTHERS.

Inasmuch as causes are not single, it is possible, after A has done an act which produces an effect, for B, another human being, to do an act which, co-operating with the effect of A's act, may produce another effect. When the question arises, is A the responsible cause of this ultimate effect it may be said that he is not, because it is brought into existence through the intervention of B. A negligently sets fire to some hay. The fire would do no harm, but B negligently runs through it with an automobile, and sweeps some of it into a heap of brushwood, which takes fire and spreads to a neighboring barn. It may be said that since the act of A uncomplemented by the act of B, would not have caused the burning of the house, A shall not be liable. But, if the wind had lifted the burning hay into the brushwood, A would no more be the cause of the burning of the house than he is when B performs the function of the wind. In both cases A's act is working in the same way. It produces a phenomenon viz: the combustion of the hay, generating heat, upon which phenomenon some other force acts, viz, wind, or B's voluntary act in transporting it to the brush-

wood, and causing the latter to take fire. Whether when wind is the secondary agent, there shall be responsibility upon A, and when B is such agent, there shall be no responsibility on A, is a question for the law-maker to answer, but A's causal relation is the same in both cases. He has simply negligently produced combustion of the hay. Everything else has been done by another agency, an agency which, however, could not have produced it, but for the prior act of A.

PROBABLE CONSEQUENCES.

We have seen that the word "natural" means little in the maxim that A is liable for the natural and probable consequence of his act. What is meant by "probable?" Unfortunately our cases do not help us to an explanation. Litigation arises only after the alleged consequence has actually occurred. X's barn has been burned. He says that a spark from the engine of the Z railroad set it on fire. Was there a spark? The evidence may make it more or less probable, or even certain that there was. Did it reach the barn? Did it originate the combustion of the barn? The evidence may justify an affirmation that it did. But this probability or certainty after the event that the fire was the effect of the spark, is not the probability contemplated by the maxim. What is meant is, a probability existing at the time of the escape of the spark, that it would cause the fire. Was the fire "within the probable foresight" of Z?[21] is the question. "The injury must be the natural and probable consequences of the negligence; such a consequence as * * * might and ought to have been foreseen by the wrong-doer as likely to flow from his act" says Paxson C. J.[22] and Mitchell J. quotes him with approbation[23].

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[21]Pa. R. R v. Hope, 80 Pa. 373.

[22]Hoag v. L. S. etc. R. R. 85 Pa., 293.

[23]Haverly v. State Line R. R. 135 Pa. 50. The trial court stated that one is liable for consequences "only so far as they are natural and proximate, and may therefore have been forseen by ordinary forecast, and not from those arising from a conjunction of his own faults with circumstances of an extraordinary nature." In Oil Creek etc. R. R., v. Keighron, 74 Pa. 316, Mercur J. remarking that the damages recoverable, are the natural and proximate consequences, adds: This I understand to be that the cause alledged produced the injury complained of without any other cause intervening"!! as if that were ever possible.

CERTAINTY OF THE RESULT.

It is not necessary, in order to make A responsible for the effect of an act, that that effect would be certain to follow. If A were certain that it would follow and the act were a wrong to X, A would be guilty of malice, if he purposely did the act. If he negligently did it, knowing that the result would follow from such negligent doing, he would be responsible. But it is not necessary that the result should seem certain to A to follow. It is not requisite that the result should be the "necessary consequence," nor that it should be proper to presume the wrong-doer to have "known" that the act would follow, as the language of Thompson C. J. in Pennsylvania Railroad Co. v. Kerr[24] intimates. In a sense all phenomena are linked with their antecedents and sequents by a bond of necessity; but this bond in each particular case, is incapable of anticipation. It is the evolution of events, in the lapse of time, that reveals the nexus. But certain events are so frequently followed by certain other events, that the observant man, on the happening of one of the former, is led, with more or less confidence, to expect one of the latter. The carriage by drafts of air, of sparks from a fire to neighboring combustible objects, is common enough to awaken apprehension, given the fire, lest it will be communicated to other things. When then the railroad company or its agents, at the time of the emission of sparks realize, or *ought* to realize, that fires of houses, barns, etc., will not improbably follow, for such fires they will be responsible.

COOPERATIVE CAUSE.

Certain agencies so rarely operate, that it is not incumbent on one under the circumstances under which he is acting, to anticipate that they may act and to govern his conduct by such anticipation. So, the degree of action of an agency may be incapable of being foreseen. Certain increases of the volume of a stream, certain violences of the wind, may be so unusual that one is excusable for not expecting them. Thus, Trunkey J remarked that the jury could determine whether dry weather and high winds in the spring time are "extraordinary, and whether, under these conditions * * * the injury was within the probable foresight of him whose negligence ran through from the beginning to the end[25], and Mitchell J. observed, "No doubt a hurricane or

[24]62 Pa. 383.
[25]Lehigh V. R. R. v. McKean, 90 Pa. 129.

a gale may be such as to be plainly out of the usual course of nature and therefore to be pronounced by the court as the intervention of a new cause."[26]

WHO DECIDES WHETHER THE CONSEQUENCE SHOULD HAVE BEEN ANTICIPATED.

Sometimes the trial judge, or the appellate court decides as matter of law, that the fire for which the action is brought, was not susceptible of anticipation by the defendant, at the time of the emission of the sparks. In one case[27] 15 feet from the track stood a frame warehouse. Thirty-nine feet from the warehouse, stood a two-story frame tavern house. Beyond the tavern house, within seven feet of it, were two adjoining houses. Sparks from an engine on the railroad, set fire to the warehouse. The wind carried the fire to the tavern. The court below allowed the lessee and occupant of the tavern to recover for the destruction of his furniture. The Supreme Court reversed without a *venire facias de novo*, on the ground that while the burning of the warehouse was the direct, that of the tavern was the remote consequence of the emission of the sparks. In Hoag v. Lake Shore & Michigan Southern R. R.[28] the railroad ran along the right bank of Oil Creek at the base of a precipitous hill. Earth and rocks fell upon the track, and a short time after a train consisting of 17 cars of petroleum, ran into the obstacle. The train was thrown from the track, and, the cars bursting, the petroleum, ignited, ran into the creek. By the creek it was carried 300 or 400 feet, to the buildings of the plaintiff, on the banks, which were destroyed. The water in the creek was high and reached the buildings. The trial judge Trunkey J. held that because

[26]Haverly v. State Line R. R., 135 Pa. 50.

[27]Pa. R. R. v. Kerr, 62 Pa. 353. Mitchell J. says of this case, "It may be doubted whether on the same facts, the court would not now send it to the jury." Haverly v. State Line R. R. 135 Pa. 50. In Hoopes v P. & B. R. R. 2 Chest. 106 the court, following the Kerr case, told the jury that the fire first attacking a hay stack from which it was carried to a barn, the company was liable for the burning of the former but not for the burning of the latter.

[28]85 Pa. 293 Cf., also Pittsburg etc. R. R. v. Taylor, 104 Pa. 306; West Mahoney Township v. Watson 116 Pa. 344; South Side, etc. R. R. v. Tritch 117 Pa. 390. In Oil Creek etc. R. R. v. Keighorn, 74 Pa. 316, the court told the jury that if certain facts existed, "the cause was not too remote;" that is, it allowed the jury to decide whether these facts existed but not whether the terminal members of the series were or were not proximate.

there was an intervening cause, viz., the creek, the destruction of the plaintiff's buildings was not the immediate; was the remote effect; and directed a verdict for the defendant. The judgment was affirmed. Paxson J. intimates that, as, sometimes, whether certain facts imply negligence is for the court, so, whether certain phenomena are so related to each other, that the cause of one shall not be responsible for the other is for the court. "It has never," he observes, "been held that when the facts of a case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdicts and reserved points," thus assuming that whether a given effect is proximate or remote, is a question of law.

QUESTIONS SUBMITTED TO JURY.

Other opinions indicate that in some cases the court may declare that the causal nexus is not sufficient to impose responsibility, while in others, it may properly allow the jury to determine. A had lumber on a tract adjoining a railroad. Between 4 and 5 o'clock on May 11th, a passing train threw out a spark which settled in a dry rotten hemlock stump standing on the right of way, within 20 feet of the track. Near the stump was a bed of dead grass. A discovering smoke issuing from the stump, sent an employe to put out the fire. He returned, reporting that he had done so. No smoke was seen again, until 10 o'clock the next day, when another employe was sent to extinguish the fire. He threw water upon the stump, until he believed he had put out the fire, remaining there from one-half to three-quarters of an hour. About noon a wind arose, and fire broke out in the vicinity of the stump. It burned over the tract on which A's lumber was, destroying it. Whether the burning of A's lumber was the natural and probable consequence of the fire in the stump, was properly left to the decision of the jury.[29] A fire began in a railroad tie. Thence it spread to some dried grass which had been cut the previous year, and lain on the right of way all winter. The distance from the frack to the plaintiff's fence was six feet. The fire reached the fence and the enclosed field, spread over it, reached another fence between the field and woods, burned this fence and the woods, which were 600 feet distant from the place where the fire began. A strong wind was

[29]Haverly v. State Line R. R. 135 Pa. 50.

blowing in the direction in which the fire advanced. Permitting the jury to decide that the destruction of the woods and the fence separating it from the field, was the probable consequence of the fire in the cross-tie, was not error[30]. Owing to a defect in a brake, a car's motion could not be controlled. It ran into an engine. The contents of the car, viz: petroleum took fire. The oil in it and in another car, and a house near the track were burned. The burning of the house was proximate to the negligence with respect to the brake[31]. The fact is that the nexus between ultimate effect and the defendant's negligence has been no clearer in the cases in which the court has undertaken to say that the former was not the probable consequence of the latter, than in the cases in which the question has been submitted to the arbitrament of the jury.

PLAINTIFF DID NOT ANTICIPATE.

Possibly if it appeared that the plaintiff, aware of a fact from which another fact is subsequently developed, did not anticipate this subsequent development, this would justify the defendant's not anticipating it. But, a fire having begun in a dry stump which the plaintiff endeavored to put out, and supposed that he had put out, but which was subsequently fanned into a flame by a wind that arose it was said that the fact that the plaintiff supposing the fire out, expected no ill results, did not excuse the defendant for not anticipating them. The agents of the plaintiff, said Mitchell J. "did not expect it because they thought the fire had been put out, not because they did not see the danger of its spreading while it was burning, and this was the danger that appellant was bound to contemplate, to wit, the natural and probable consequence of the original act, not the effect of the supposed extinguishment subsequently"[32].

[30]Pa. R. R. v. Hope, 80 Pa. 373. The proximateness of the consequence to the cause was submitted to the jury in Pa. R. R. v. Lacey, 89 Pa. 458; Lehigh V. R. R. v. McKeen, 90 Pa. 129; Oil Creek R. R., v. Keighron 74 Pa. 316; Confer v. N. Y. etc. R. R., 146 Pa. 31; Stephenson v. Pa. R. R. v. 20 Super. 157; Pa. R. R. v. Shultz 93 Pa. 341; R. R. v. Stranahan, 79 Pa. 405.

[31]Oil Creek ect. R. R. v. Keighron. 74 Pa. 316. Here the court gave instruction to the jury as to what facts would be, and what facts would not be, too remote from each other.

[32]Haverly v. State Line etc. R. R. 135 Pa. 50.

FIRES OCCASIONED OTHERWISE THAN BY SPARKS.

The ordinary case of liability of a railroad company for setting fire to the property of others, is that in which the fire is caused by the escape of sparks from the engine. But, it is responsible for a fire occasioned in any other way by the negligence of its agents and servants. A servant of the company e. g., negligently handles a tank car so that it collides with an engine, the oil takes fire, other cars and the engine are involved in the conflagration, which attacks the house of the plaintiff standing about 20 feet from the track. The company is liable for the injury to the house and its contents[33]. A train of oil cars running into an obstacle upon the track, and being overset and the oil set on fire, and floating down an adjacent creek into which it runs, it was tacitly assumed that the company would be liable for the burning of a house on the margin of the creek lower down, if that burning was not too remote a consequence[34].

FIRES OCCASIONED BY SPARKS. KIND OF FUEL.

Railroads exist in order that trains may be driven over them. They cannot be driven by steam, unless the steam is generated. It cannot be generated except by heat, and the obtaining of heat is practicable, only by the combustion of wood or coal. The railroad company may therefore use wood, anthracite or bituminous coal, or any other ordinary fuel[35]. In a case in which wood was used for fuel, witnesses expressed different opinions as to the comparative danger of wood and coal. In answer to a point of the plaintiff, that it was incumbent on the railroad company to use such fuel as, while enabling it to obtain the proper speed, was least likely to endanger the plaintiff's property, a bridge, by the emission of sparks, the court said that it was the duty of the company to use ordinary care in respect to the fuel. "Was the fuel used on this occasion" it asked the jury, "any other than ordinary fuel?" Indeed there is some diversity as to whether coal or wood emits most sparks, or is the most dangerous species of fuel."

[33]Oil Creek etc. R. R. v.Keighron, 74 Pa. 316.

[34]Hoag v. Lake Shore etc. R. R., 85 Pa. 293.

[35]L. & B. R. R. v. Doak, 52 Pa. 379; Henderson v. P. & R. R. R., 144 Pa. 461.

NEGLIGENCE NECESSARY.

For fires not caused by negligence, there is no liability on the part of the railroad company. It is not responsible for accidental fires, when they have not resulted from the want of care[37]. Negligence is the absence of the care which the circumstances require and secure from an ordinarily careful person. It is always ordinary care, but different circumstances require different degrees of care, which will nevertheless be ordinary care in these circumstances. That which is ordinary care in a case of extraordinary danger, said Agnew, J. would be extraordinary care in a case of ordinary danger, and that which would be ordinary care in a case of ordinary danger, would be less than ordinary care in a case of great danger[38]. The railroad company must exert more care when the property of others is in danger, than otherwise would be required[39]. The attention of the company must be given to all the matters which may affect the risk of setting fire to buildings; to the character of the fuel used; to the management of the fuel[40], e. g. the putting of not more than a proper amount in the fire box[41] or the moving backward and forward of the engine[42] to the use of obstacles to the escape of sparks and hot cinders from the stack; to the removal of inflammable stuff near the tracks, through which, if set on fire by accident, the fire may be propagated.

COMBUSTIBLE MATERIAL.

The railroad company must remove from proximity to its engines, any combustible material which proper care requires

[35]F. & B. Turnpike Co. v. P. & T. R. R. 54 Pa. 345.

[37]Erie R. R, vs. Decker 78 Pa. 293; F. & B. Turnpike Co. v. P. & T. R. R. 54 Pa. 345; Henderson v. P. & R. R. R. 144 Pa. 461; Albert v. N. C. R. 98 Pa. 316; Pa. Com. v. Watson, 81½ Pa. 293; Oil Creek etc. R. R. v. Keigh ron, 74 Pa. 316; Pa. R. R. v. Hendrickson, 80 Pa. 182; P. & R. R. v. Yeager 73 Pa. 121; Mathews v. P. & L. S. R. R., 18 Super. 10.

[38]F. & B. Turnpike Co. v. P. & T. R. R., 54 Pa. 345.

[39]Huyett v. Pa. R. R. 23 Pa., 373; Mathews v. P. & L. S. R. R. 18 Super 10.

[40]Henderson v. P. & R. R. 144 Pa. 461: F. & B. Turnpike Co. v P. & T. R. R. 54 Pa. 345.; Pa. R. R. v. Hendrickson 80 Pa. 182.

[41]P. & R. R. v. Yéager, 73 Pa. 121.

[42]Id. Excessive work put on the engine, causing emission of sparks, may be responsible negligence; Jennings v. Pa. R. R. 93. Pa. 337.

[43]Confer v. N. Y. etc. R. R., 146 Pa. 31.

it to remove. An iron tank car in which tar was carried had been left standing upon a switch. A spark set fire to this car. Thence the fire was communicated to plaintiff's oil tanks. The railroad company could have removed the tank car after it had taken fire. Its negligent omission to remove the tank car would make it responsible for resulting injury[43]. The company may improperly allow combustible stuff to be within its tracks, or upon the strip of land which forms its way, or in the neighborhood of it, and, thus assisting a fire to begin, or having begun, to be propagated, may become liable for the ultimate destruction of property. Weeds, briers, huckleberry bushes, etc., had been cut on land of the railroad, adjoining its tracks, and had been cast on it, and allowed there to remain. They had become dry and readily inflammable. A spark getting into it, caused it to take fire, and the fire was communicated to sprout land adjoining and thence to timber land. The company was liable for its negligent act[44]. In Pennsylvania Railroad Co. v. Hope[45] the only negligence shown consisted in the allowing of weeds and grass, cut the previous fall to remain in the "right of way" until March, when the fire occurred.

NO RIGHT TO BE CARELESS.

The railroad company is bound to exercise ordinary care, in whatever way it may have acquired its right of way whether by license or by grant from the owner, or in the mode pointed out by the statutes. It acquires no right to be negligent[46].

LOCATION OF TRACK NEAR BUILDINGS.

No duty of a railroad company has been recognized in locating its route to keep so far away from existing buildings as to prevent danger of fire. It can locate a station so near to a bridge, that it will not be possible to pass from the former to the latter, without much steam, although the consequence is the emission of sparks, which endanger the bridge. In the

[43]Stephenson v. Pa. R. R. 20 Super. 157; Post v. Buffalo etc. R. R. 108 Pa. 585; Flynn v. San Francisco etc. R. R. 40 Cal. 14, quoted in Pa. R. R. v. Hendrickson, 80 Pa. 182.

[44]80 Pa. 373; Elder Township v. Pa. R. R.; 26 Super. 112.

[45]Pa. R. R. v. Hendrickson 80 Pa. 182; Stephenson v. P. & R. R. 20 Super 157.

[46]P. & R. R. R. v. Hendrickson 80 Pa. 182, Stevenson v. P. & R. R. R. 20 Super. 157.

absence of proof of a special motive to do injury, the court will presume that the location was selected for proper ends. To hold that it is improper for the trains to stop at a station 400 or 500 yards from a bridge, and that steam must be shut off, when passing near the bridge (150 to 300 feet) would abridge the proper and ordinary use of the road[47].

ARRESTING SPARKS.

The railroad which operates by steam, must create heat, and it may create heat by the combustion of wood or coal. This combustion is effected by the introduction of air into the midst of the fuel, and this is feasible only under such conditions as cause a draft, and the rising up through the stack, of smoke, and, at times, cinders and burning sparks. To prevent the draft altogether, would be incompatible with the procuring of the necessary amount of steam[1]. If any devices therefore, are employed to arrest escaping sparks, they must be employed under the condition that they do not interfere with the necessary amount of draft. It has been found by experience, that screens may be used which will diminish the number of escaping sparks; which will allow sparks of a small size only to escape, while not unduly interfering with the combustion necessary for the generation of the requisite heat. It has therefore become the duty of the railroad company, being properly careful to guard against injuries by fire to the property of others, to use spark arresters. The absence of a fit spark arrester was said by Clark J, to be prima facie evidence of negligence on the part of the company[2]. It is at least evidence from which the jury may infer negligence[3]. In Lackawanna & Bloomsburg Railroad Co. v. Doak, decided in 1886, Read J. observed, that "in a wood-burning engine, sparks will be arrested by a screen or spark-catcher of fine wire, and this, if in proper order, will to a very great extent, prevent all danger. An anthracite coal burner" he said, "will

[47]F. & B. Turnpike Co., v. P. & T. R. R. 54 Pa. 345.

[1]"There is a point," says Paxson J. "beyond which human ingenuity cannot go in the manufacture of screens for arresting sparks. There must be sufficient vent for draught, and where there is draught, there will necessarily be sparks, of a greater or less size." Post v. Buffalo etc. R. R., 108 Pa. 585.

[2]Henderson v. Phila. etc. R. R., 144 Pa. 461; Matthews v. Pittsburg etc. R. R. 18 Super. 10.

[3]Lackawana etc. R. R. v. Doak 52 Pa 379.

not admit of a screen or spark-catcher of wire, but will of a screen or spark-catcher of tank iron with apertures of 3/8 of an inch, such as are used on the Philadelphia and Reading Railroad, the greatest coal road of the country, and on the Delaware and Belvidere Railroad." He further said that he understood that no screens were used on the coal-burners on the Lackawanna and Western Railroad, on account of its very heavy grades requiring the utmost draft, and the road passing through a wild and sparsely settled region. No such reason, he said, applied to the Lackawanna and Bloomsburg Railroad which follows the course of the Susquehanna; and he concluded that the omission by it to use a spark-arrester, should be submitted to the jury as negligence, because such spark-arresters had been long ago introduced by the Reading Railroad.

RIVAL TYPES OF ARRESTERS.

Various types of arresters have been invented and put at the disposal of railroad corporations. In one case there was proof that the defendant used the spark-catchers known as the "Yankee Stack"; that this stack was most generally in use in the northern part of the United States, but not so much in the southern part. Several other kinds were mentioned by witnesses, and different opinions given of their comparative merits. The general opinion was that the "Yankee Stack" was among the best for steaming purposes; but there was evidence that there were others in use which were *more secure as* to the emission of sparks. The court refused to say that it was the duty of the defendant to use "the best and most approved form of spark-catcher in use, for the purpose of guarding against the emissions of sparks," but said instead, that if the defendant used ordinary care and skill in procuring good and safe spark arresters, such as are most in use in the country, and approved by experienced railroad operators and mechanics they would not be required to use any other or greater care and skill. The supreme court was content with the answer, interpreting it to mean that the spark catchers adopted must be in fact good and safe and approved by experience, that the practice of other leading roads was not a rule of decision, but simply evidence of the fitness of the arrester adopted by them[4].

[4]F. & B. Turnpike Co. v. T. & P. R. R. 54 Pa. 345.

A spark-catcher of fine wire is said by Read J., to be better adapted to wood-burning engines, while one of tank-iron is better suited to anthracite burners[5]. When several types of screens compete for adoption by the roads, and some are adopted by some, and others by other roads, it is not necessary that that which the particular jury should think the best should have been adopted by the defendant. If its opinion of the fitness of the screen used by it, is supported by that of a reasonable number of roads of fair standing, the jury probably cannot be justified in saying that it did not exercise the proper care in making the selection, but in any case, unless the jury finds that it did not exercise the proper care in the selection, it will not be liable because it used the arrester selected. That the arrester used, is commonly used by railroad companies, can always be shown by the defendant[6]. It is improper to allow the plaintiff to prove that there are certain appliances which would diminish the escaping smoke and which defendant refuses to adopt until the expiration of the patents on them, because such evidence could throw no light on the question whether the spark arrester in use upon the engine, was up to the standard of such arresters as the defendant was bound to use[7]. In Matthews v. Lake Erie Railroad Company[8] a model of the engine was exhibited to the jury with a section of the spark or guard arrester in use at the time of the fire. It showed that the arrester was composed of No. 8 wire netting and had two and one-half to three meshes to the inch, so as to make uniform interstices of three-sixteenths of an inch in size. It was testified that it was the latest approved and best designed appliance in use.

[5]L. & B. R. R. v. Doak, 52 Pa. 379. In Henderson v. Railroad Co. 144 Pa. 461, the "extended smoke-box spark-arrester" is spoken of as a superior arrester. In Gowen v. Glaser, 2 Sadler 250, two types of spark-arresters were shown by the defendant to be in use; a steel corrugated spark-arrester placed at the top of the chimney stack; and another inside of the end of the flues and invisible from the outside. In Railroad Co. v. Yeiser, 8 Pa. 366 three kinds of arresters are spoken of, the French & Baird's patent, the inverted cone and the bonnet.

[6]Specimen Pa. R. R. v. Page, 22 W. N. 12.

[7]Pa. R. R. v. Page, 21 W. N. 52.

[8]18 Super. 10.

KIND OF ARRESTER.

Not the use of any sort of an arrester will satisfy the rule which requires due care on the part of the railroad company. It may allow the escape of too large sparks. It is for the jury to say whether one that allows sparks from 3/8 to 1/2 an inch in size to be emitted is proper[9] for, in the present state of mechanical invention, the emission of large sparks, able, after being carried a considerable distance, to set fire to buildings, may be taken as proof that there is no sufficient spark-arrester[10]. The condition of the arrester at the time at which the sparks escape, is the material question. If it is not then in proper condition, on account of wear, or the acts of human beings, or otherwise, the company will not perform its duty, although it is of the proper type[11]. But, the condition of the arrester shortly before, and after the emission of the sparks which caused the fire may be some evidence of its condition at that time, and this earlier or later condition may be shown by evidence of the utterance of sparks and the causing of other fires by the locomotive, shortly before or after[12].

EVIDENCE AS TO ARRESTER.

The defendant may offer evidence of the good condition and type of the arrester, of the daily examination of it and of the ascertainment, in that way, of its state. This evidence of the inspector of spark arresters, the engineer, fireman, or other agent of the defendant, is by no means conclusive.[13] It may be contradicted by persons who have seen the arrester at or near the time. As a proper spark arrester, in good condition,

[9]Wilson v. Phila. etc. R. R. 9 Del. 505.

[10]Henderson v. R. R. 144 Pa. 461. Phila. etc. R. R. v. Hendrickson, 80 Pa. 182; Pa. Co. v. Watson 81 1/2 Pa. 293; Pa. R. R. v. Lacey, 89 Pa. 458; Phila. etc. R. R. v. Shultz, 93 Pa. 341.

[11]P. & R. R. v. Schultz, 93 Pa. 341,

[12]Henderson v. Pa. R. R. 144 Pa. 461.

[13]P. & R. R.R v. Yeager, 73 Pa. 121; Erie R. R. v. Decker, 78 Pa. 293; P. & R. R. v. Hendrickson, 89 Pa. 182. Albert v. N. C. R. R. 98 Pa. 316; In Thomas v. N. Y. etc. R. R., 182 Pa. 538, the inspector of the spark-arresters testified that he had inspected the particular arrester on the day of the fire, and the day after and had found it sound. His testimony was not based upon his recollection, but upon an entry in a book. In Wilson v. P. B. & W. R. R. 9 Del. 505, the court declined to say that allowing the escape of sparks 3/8 to 1/2 inch in size was not negligence, but submitted the question to the jury.

will not allow of the emergence of large sparks, the fact that large sparks do emerge from the stack is evidence that the arrester is not of the proper type, or is not in proper condition. It may refute therefore, the most explicit testimony of the agents of the defendant[14]. Certainly the fact that an engine emits a stream of fire and sows the coals broadcast along its way, setting fire to many things along the track, is evidence from which the jury may infer an imperfect and inferior spark catcher, and from this fact negligence[15]. The large size of the sparks thrown out of the stack, may therefore always be shown, as evidence that the spark arrester is not of the proper sort or in the proper condition; e. g. that cinders as large as hickory nuts[16] or walnuts[17] or 3/4 of an inch in size[18] were picked up at or near the place where the sparks which caused the fire, were cast out of the stack. Inasmuch, however, as all practicable spark-arresters will permit the escape of small sparks, it cannot be inferred from the passage through them of very small sparks, e. g. of sparks of the size of a pea, that they are defective, it not being shown that any spark-arrester in use would prevent the emission of such sparks[19].

ARRESTER—CAUSING OTHER FIRES.

Small sparks may kindle as large a fire as big sparks[20] and since their escape cannot be prevented by good spark arresters, the railroad company will not be liable for fires caused by them, "though they fire every rod of the country through which they run"[21]. The mere fact that fires are started by an engine, at different places in the same field, will not warrant

[14]Albert v. N. C. R. R. 98 Pa., 316; Huyett v. Pa. R. R. 23 Pa. 373; Pa. R. R. v. Watson. 81 1/2 Pa. 293; Van Steuben v. Central R. R. 178 Pa. 367; P. R. R. v. Schultz, 93 Pa. 341; Matthews v. Pittsburg etc. R. R. 18 Super, 10; Pa. R. R. v. Stranahan. 79 Pa. 405; Thomas v. N. Y. etc. R. R., 182 Pa. 538; Shelley v. P. & R. R. 211 Pa 160.

[15]Pa. Co. v. Watson, 81 1/2 Pa. 293.

[16]Gowen vs. Glaser 2 Sadler, 250; Pa. R. R. v. Schultz, 93 Pa. 341; Albert v. N. C. R. R. 98 Pa. 316; Van Stuben v. C. R. N. J. 178 Pa. 367.

[17]Pa. R. R. v. Stranahan, 79 Pa. 405.

[18]Matthews v. Pittsburg etc. R. R. 18 Super. 10.

[19]Pa. R. R. v. Page, 21 W. N. 42; Henderson v. Phila. etc. R. R. 144 Pa. 461, 483.

[20]Jennings v. Pa. R. R. 93 Pa. 337.

[21]P. & R. R. v. Schultz, 93 Pa. 341.

the inference that it has no proper spark arrester[22] nor will the fact that the engine was puffing very hard, that its wheels turned around without moving forward, that it threw out sparks (not said to be large or numerous)[23]. But, if fires are set at a great distance from the track, probably an inference of the considerable size of the sparks will be justified[a]. Perhaps too, the number of the emergent sparks might convince that there was not the obstruction to their escape which an orninary good spark arrester would furnish. In Philadelphia & Reading Railroad Co. v. Hendrickson,[24] evidence was received that the freight train which burned plaintiff's barn, was running at unusual speed, for a distance from 1 1/2 miles east to 1 1/2 miles west of the barn, that the sparks emitted by the engine formed a "perfect streak of fire"; that smoke resulting from the burning grass and other things was visible "all along the line". A point that "the burning of grass along the line of the defendant's railroad in the ordinary use of defendant's railroad, is not in itself an act of negligence, nor does it establish by inference an asserted act of independent negligence, of which there is no proof", the court answered without error, "This is correct. But I add and repeat the instructions before given, that if the evidence satisfies the jury that an unusual amount of fire issued from the engine for a distance of three miles along the road by which the grass and fences all along, as well as plaintiff's barn was burned, the evidence as to the burning of the grass may be taken into considerarion with the other evidence in the case, in determining the question of negligence"[25].

[22]Jennings v. Pa. R. R. 93 Pa. 337. Henderson v. Phila. etc. Co. 144 Pa. 461.

[23]Pa. R. R. v. Yeager, 73 Pa. 121.

[a]A witness testified that coals as large as hazel nuts were thrown from 150 to 200 feet, in Van Steuben v. C. R. R. N. J. 178 Pa. 367; In Kenett v. P. & R. R. 23 Pa. 373, Lourie J. says, "When we find fires started by a locomotive at distances of 80 to 150 feet from the road, how can we say that that is no evidence of carelessness? It is a question of fact whether the small sparks that escape through a good spark-catcher, will ignite wood at such a distance."

[24]80 Pa. 182.

[25]No arrester, said the court, in Post v. Buffalo etc. R. R- 108 Pa. 585, "however carefully it may be constructed, will prevent fires where light and inflammable materials are near the line of the road. There is a point beyond which human ingenuity cannot go in the manufacture of screens for arresting sparks."

TIME AND SPACE, IN WHICH SPARKS HAVE BEEN THROWN.

When the engine which has emitted the spark that has carried the fire in question is known, and the question is whether it was supplied with a proper spark-arrester, its behaviour at other points and times, as indicating that at these times it did not have a proper spark-arrester, may be shown, as making a probability more or less strong, that it had no such arrester when it cast out the sparks which caused the fire, the subject of litigation. The time within which this other behaviour may be shown is somewhat restricted. Two weeks before the fire in question[26] are not too long. Probably a month is not too long[27]. Apparently six months are too long[28]. The behaviour of the locomotive "shortly before" is admissible[29]. Behaviour of the engine shortly after the fire in dispute is also admissible[30]. The fact that an engine which for some time had been casting out dangerous sparks, alarming the property owners, suddenly ceased to emit sparks, when the fire, for which the suit is brought, occurred, is said by Gordon J. to be "significant"[31]. If the proper limit of time is observed, the place at which the engine has cast out sparks and caused fires, ought to be immaterial. It may be shown that on its trip however long, it has continuously cast out live coals, setting fire to fences and grass in the vicinity of the railroad[32].

BEHAVIOUR OF THE ENGINE.

When the engine which has emitted the sparks that have caused the fire which is the subject of litigation is known, the behaviour of engines known to be different from it, or of other engines, none of which, so far as shown, is the

[26]P. & R. R. v. Shultz, 93 Pa. 331; Shelly v. P. & R. R. 211 Pa. 160. The evidence however was inadmsisible because it did not appear that the emission of sparks within the two weeks was by the same engine.

[27]Albert v. N. C. R. R. 98 Pa. 366.

[28]Henderson v. P. & R. R. R. 144 Pa. 461, 488. Other fires by the same engine on the same day, may be shown. Thomas v. N. Y. etc R. R. 182 Pa. 538.

[29]Van Steuben v. C. R. N. J. 178 Pa. 367; Gowen v. Glaser, 2 Sadler, 250; Henderson v. P. & R. R. R. 144 Pa. 461.

[30]Gowen v. Glaser; Henderson v. P. & R. R. R.; Van Steuben v. C. R. R. N. J.

[31]P. & R. R. v. Schultz, 93 Pa. 341.

[32]P. & R. R. v. Hendrickson, 80 Pa. 182.

engine in question, is not admissible. It is supposed that the fact that the corporation has negligently omitted to furnish engine A, or B, or C, with a fit spark arrester would not be a sound reason for inferring that engine X was likewise unprovided. The reason assigned for the exclusion of this evidence is not quite satisfactory, In a case in which the engine was identified by the plaintiff as No. 458, Gordon J. said "If then this engine was in a proper condition, it mattered not that every other engine, used by the company, was without the proper appliances for preventing the ejection of coals and sparks. On the other hand, if the engine was dangerous, in this respect, it was of no consequence that all the others upon the road were safe. Such being the case, it is manifest that all evidence going to prove defects in engines belonging to the company, other than the one alleged to have produced the injury complained of was irrelevant to the issue pending, and should have been excluded"[33]. A tyro in jurisprudence knows that many facts are adventitiously relevant, simply because they tend to make probable other facts which are intrinsically so. The good character of a defendant in a criminal prosecution is an instance. The reputation for inveracity of a witness is another.

The defendant's possession of a pistol three hours before the shooting, is on a trial for homicide admissible, not because then having the pistol is a part of the crime, but because from it an inference may be drawn as to the possession of the pistol at the time of the shooting, and the actual use of it by the defendant. Would it not be astonishing if a railroad company had 1000 engines and 999 of them had no spark arresters, that the thousandth had one? Does not the neglect of the company in 999 cases, make probable the same form of neglect on the remaining case? All such questions are to be solved by probabilities. Behind the most explicit testimony of a witness, is the question did he know? did he attempt correctly to express what he knew? And these questions are to be determined by probabilities. If the inspector says the

[33]Erie R. R. v. Decker, 78 Pa. 293. The stack-inspector said that he had not found a broken grate in three years. A witness for plaintiff testified that within three years he had known the netting to be thrown away, and an engine to run without any. The engine that caused the fire was No. 458. Hence this testimony for the plaintiff was inadmissible, because it tended to show defecfs in other engines.

engine No. 458 had a good spark arrester, is his testimony not weakened by the fact that no other of the engines had such arrester? The objection which Gordon J, makes to the evidence of the condition of other engines, would apply to that of the same engine, at a different time. If it is true that the railroad company may be neglectful as to one engine, while not so as to another, and therefore its neglect as to the former is to be excluded, when the question is, was there neglect as to the latter, it is equally true that the company may have been neglectful as to an engine, two weeks ago, and not neglectful as to it today? And it may just as plausibly be said, the question at issue is not what the condition of the engine was then, but what is it now. However, unconvincing as is the reason for its support, the proposition is adhered to by the courts that when it is known what engine has caused the fire, the conduct of no other engines, the conduct of the railroad company, in respect to no other engines, is admissible[34]. It may be known not that engine No. 21 caused the fire, but that either No. 21 or No. 126 caused it. The same principle of exclusion operates in that case. "Hence," said Paxson J. it is entirely clear that evidence that other engines on some other day [or the same day] threw out an unusual amount of large sparks and live coals was immaterial, and if received could only have confused, and might have misled the jury. Nor would it have been evidence to show that the spark arresters on engines 21 and 126 were out of order[35]".

FIRE CAUSED DISJUNCTIVELY BY SEVERAL ENGINES.

If, when the fire is caused by one of two known engines, the evidence of neglect to furnish proper spark-arresters must be confined to these two, when the fire is caused by one of three, must the evidence be confined to the three? Probably. Suppose the number is four[36] or ten, or 20 or 50? Suppose the company has 100 engines, and the fire is proved to have been caused by one of them. Must evidence be offered that each of the 100 was without a fit spark-arrester? But it has

[34]Erie R. R. v. Decker, 78 Pa. 293; Henderson v. P. & R. R. 144 Pa. 461.

[35]Albert v. Northern Central R. R. 98 Pa. 316.

[36]In Henderson v. P. & R. R. 144 Pa. 461 the fire was known to have been caused by one or more of four engines, only one of which was identified. Evidence of the behaviour of engines generally, was allowed.

not been held that when all that is known is, that some one engine of the company caused the fire, evidence of the behaviour of engines, that is of some engines of the company cannot be given, unless it embraces also the behaviour of all the engines.

WHAT IS IDENTIFICATION?

To identify a thing is to predicate its oneness with some previously observed thing. A sees a man to-day. A month later, he sees a man. He identifies the two, when he predicates that the man last seen is the same as the man first seen. To identify, in a derived sense, is to observe some note or quality of a thing by which it, the same thing, can be at another time, known to be the same thing. Engines may be distinguishable by size, shape, material, color, etc.. They may receive certain numbers, or names[37] and A, observing an engine of a certain number casting out sparks, can, when he later sees it, affirm that it is the very engine that cast out the sparks; or he may assist the jury, the court, the witnesses, to attribute what he affirms the engine to have done to the *same* engine to which he attributes it. If the witness says engine No. 72 cast out the sparks, every body, on seeing or imagining engine No. 72, understands that it is the engine of which A. has made the assertion. But suppose the only thing known of the spark-emitting engine is, that it passed the premises where the fire occurred at a certain time, and that it emitted sparks? Is it identified? Can the plaintiff pick it out from the 1000 engines belonging to the company? Does it bear on itself the record of these transitory doings? If it is to be identified it will be perhaps, by the records of the company which show, or by some one of its agents, who is able to state, what engine it was that drew the train that passed the site where the fire occurred, at the time of its origination. Is this capacity of the engine to be individuated by the company's books or officers, as the one that made the trip in question, an identification of the engine? Apparently it is. In Shelly v. Pa. R. R.[38] it was shown that the New York Milk train (a train running daily at a certain hour) was the cause of the fire.

[37]P. & R. R. R. v. Yeager 73 Pa., 121; the engine called "the Lancaster" was in question.

[38]211 Pa. 160.

The plaintiff offered to prove that the New York milk train within two weeks prior to the fire, had cast out large sparks. The evidence was excluded until it was shown that the same engine had pulled the train on those prior occasions. The engine was said to be "identified", and therefore only its own behaviour at other times could be proved. "By being identified" said Fell J. "it is not meant that the engine should be known by its number, size or shape from all other engines, but that it should be known as the engine to which the probable cause of the fire is traced. The identification is not to distinguish it from other engines generally, but to point it out as the engine that caused the injury. In this sense its identification was as complete as if its number had been known to witnesses." But, so far as appears there was no evidence by the defendant, or by the plaintiff, what engine it was which drew the milk-train. So far as appears, nobody could have picked from the 1000 locomotives of the defendant, the peccant individual. Why does the rule distinguish between "identified" and "unidentified" engines? Merely because the condition of the former can be shown otherwise than by inference from the condition of engines generally. But unless the plaintiff knows something more of an engine than that it drew a ceatain train, how can he show its condition? He can learn what engine it was that drew the train, only from the employes of the railroad, and he can learn whether it had a good spark arrester only from them. If his ability to learn from them what engine it was that drew the train identifies it, in every case in which he proves that a fire was caused by some engine passing at a certain time, although he actually knows no more of it, it is identified. The officers or agents of the company in every case, can show what engines passed a given place about a certain time.

WHEN ENGINE IS NOT IDENTIFIED.

The plaintiff may identify the engine. He may prove that it was the "Lancaster,"[39] or "No. 458[40]. If he does not identify it, otherwise than by saying that it was drawing a train that p .ssed the premises at or within a certain time, he may show not only its behaviour while drawing this

[39]P. & R. R. v. Yeager, 73 Pa. 121.

[40]Erie R. R. v. Decker, 78 Pa. 293.

train, but the behaviour of cars generally, of the company, so as to create a certain probability that since the company did not furnish other engines with good spark-arresters it was similarly delinquent as to this particular engine. In Penna. Railroad v. Stranahan[41] the fire in the barn began between 2 and three o'clock p. m. Two trains had passed about noon. Witnesses were properly allowed to testify that "it is a common occurrence for *the engines* to throw sparks and set fire for rods from the railroad" track, because it was a case "where the engine was unknown. It did not occur to the court that it was known by the fact that it drew the train passing the place about noon. After the evidence of the plaintiff, who has not identified the engine is in, the defendant may show what engine it was, if any, that caused the fire. The giving of such evidence would scarcely justify the court in striking out the evidence previously given by the plaintiff, as to the conduct of engines generally or of particular engines, because the court cannot accept the testimony of the defendant's witness as decisive. But the court would probably tell the jury that if the engine had became identified, they should disregard the evidence as to the behaviour or condition with respect to spark-arresters, of other engines. There is no case which holds that if the plaintiff "could fix" (e. g. by calling the agents of the railroad,) what engine did the harm, he should be treated as if he had fixed it, although Thayer P. J. in passing on the admission of evidence once said[42] "if the plaintiffs could fix, or by their evidence had fixed, a particular engine which had done the injury", it would be improper to admit evidence that the engines [vaguely generally] of the road repeatedly set fire to property along the track.

WHEN ONLY SOME OF SEVERAL ENGINES WHICH MAY HAVE CAUSED THE FIRE ARE IDENTIFIED.

The evidence may show that one of two, or three, or four or a larger number of engines, caused the fire, and only one

[41] 79 Pa. 405; Cf. Gowen v. Glaser 2 Sadler, 250.

[42] Gowen v. Glaser, 2 Sadler, 250. In Huyett v. P. & R. R. 23 Pa. 373, the fire was caused by one of several unknown engines. The conduct of these engines on that trip, was offered in evidence, only. Although the defendant identified the engines, seven in number, that passed the place of the fire and sparks from which might have carried the fire, the evidence of the behavior of engines generally was not withdrawn.

or some, of these engines may be identified. The fire may have been caused by *a* or *b*, or *c*, or *d*. The plaintiff identifies *a*, but not *b*, or *c*, or *d*. Since then the fire may have been caused by *b*, or *c*, or *d*, and not by *a*, the want of proper spark arresters on other engines, as manifested by their behaviour in emitting large sparks, and causing fires, or otherwise, may be shown. Said Clark J.[43] "It may therefore be considered as settled, in cases of this kind, where the offending engine is not clearly or satisfactorily identified, that it is competent for the plaintiff to prove that the defendant's locomotives generally, or *many* of them, at or about the time of the occurrence, threw sparks of unusual size and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged. And as in the case at bar, it is not definitely ascertained to which of the four engines this fire was attributable, three of them being unknown and unidentified, we cannot see how testimony of this character could be excluded." In this case the evidence showed the minutes within an hour prior to the fire when three trains going north, a coal train, and two passenger tains, and one train going south, a freight train, passed the point. It did not occur to the court that this was an identification.[44]

CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.—ADOPTING PRECAUTION AGANST FIRE.

It is denied by Gordon J. that the owner of land through which a railroad runs is under a duty to prevent the accumulation of dry leaves, brushwood and other rubbish on his land, which would be readily fired by sparks. The railroad company he remarked, is in any case, liable for negligence; and property owners along the railroad are under no duty to guard

[43]Henderson v. Phila. etc. R. R., 144 Pa. 461.

[44]In Van Steuben v. C. R. R. of N. J. 178 Pa. 367 the fire might have been caused by one of two engines; one of which was not identified, otherwise than by the fact that it drew one of the trains about that time. Evidence of the behavior of engines generally, about the time of the fire, was received. If there is a conflict between the witnesses for the plaintiff as to whether the fire was caused by No. 315, or by another not identified, it is for the jury to say, by which the fire was caused. If it finds that either of the engines may have caused the fire, it will consider the evidence as to the conduct of engines generally.

against its negligence. Hence, if A has woodland, which is separated from the railroad by land of B, and the woodland is injured by a fire beginning on the right of way, and extending to brushwood on B's land, and thence to the woodland, A's recovery will not be defeated because of the accumulation of leaves, etc., either on his own or on B's land. To hold so, would be to "impose upon property owners along the line of a railroad, duties unknown and unnecessary before the building of the road." That the owner "must guard, in any way, or by any means, against the improper and unlawful use of the locomotive, is a proposition that cannot be sustained"[45]. A barn standing within 60 feet of the line adopted subsequently to its erection for the track of the railroad, it is not contributory negligence for the owner not to cover the barn with slate, metal, or other non-combustible substance so as to protect it from fire by sparks falling on the roof. To hold otherwise, would, says Agnew C. J., require the owner to keep the property along a railroad "in a condition to be always safe from sparks or fire thrown from the passing engines. It would deprive the owner of the enjoyment of his property in the way most suited to himself"[46].

SETTING PROPERTY TOO CLOSE TO RAILROAD.

Perhaps the owner of premises near an existing railroad, may be negligent in the selection of a site too near the road, for inflammable buildings or materials. A established an oil refinery on both sides of the track of a railroad. On one side were a number of oil tanks, one of which, No. 4 a wooden one thousand barrel tank, containing 700 barrels of Clarendon distillate, was 36 feet from the centre line of the defendant's switch track. A fire originating in a tank car, was carried by the wind to No. 4, and the refinery was destroyed. The court refused to say, but submitted to the jury to say, whether,

[45]P. & R. R. v. Schultz, 93 Pa. 341; Thomas v. N. Y. etc. R. R. 182 Pa. 538; L. V. R. R. v. McKeen, 90 Pa. 122. In Weideman v. L. V. R. R. 2 Law Times (O. S.) 126, Handley J. said that if the plaintiff allowed combustible material, in a careless and negligent manner to lie upon his premises, with the result that a fire occurred, he could not recover. But was the mere permission of such material to lie, *ipso facto* negligent?

[46]P & R. R. v. Hendrickson, 80 Pa. 182. In Railroad v. Yeiser, 8 Pa. 366, it was held to be negligence for an owner to extend his fences into the defendant's right of way, so as to defeat a recovery for a fire that would not have occurred, but for this trespass.

by erecting the refinery so close to the track, the plaintiff was guilty of contributory negligence.[47]

MANAGEMENT OF PROPERTY.

About 90 feet from the railroad was a building used for the storage of coal and straw. A locomotive set fire to some straw lying between 15 and 20 feet from the building. Thus the fire was communicated to the building. It did not appear that there was more straw scattered about, than would ordinarily collect from the business transacted in the building. A judgment for the plaintiff was affirmed[48]. In an action for the destruction of ice by a fire, there was evidence that the plaintiff had a large quantity of ice stored in ice houses. The main line of defendant's road ran past, but not to, these houses. A siding was constructed leading to them. The fire began in some grass and shavings and a tie, it communicated to some shavings surrounding the tie, and thence to the ice-houses. It was proved that for the storage of the ice, large quantities of shavings were used, and after the houses were emptied they were removed, put in heaps and dried. When the ice-houses were again filled, all the shavings fit for use, were used again. The rest were left to rot. When fresh shavings were put in, they were hoisted up in baskets, and thus unavoidably scattered by the wind. When ice was loaded into cars it was dropped on an inclined plane, so that the shavings that were on it, were scattered about. The court charged that for the proper use of the shavings, the plaintiff would not be responsible, but that it would be contributory negligence to allow shavings "to remain around the siding, or piled up on either side of it in such quantities as to render it possible for the engine used by the defendants, in running on the siding and removing the cars, to set them on fire, and cause the destruction of the property of the plaintiffs." A verdict and judgment for the defendants were sustained in the supreme court[49].

[47]Confer v. N. Y, etc. R. R. 146 Pa. 31 The jury decided that the plaintiff was not negligent.

[48]P. & N. Y. R. R. v. Lacey, 89 Pa. 458. No decision of the contributory negligence.

[49]Kennebec Ice Co. v. W. & N. R. R. 14 W. N. 554. Cf. Post v. Buffalo, etc. R. R. 108 Pa. 585, where the court granted a compulsory nonsuit, because of the plaintiff's negligence in piling his lumber very near to the track, where there was no watchman, where there was much inflammable rubbish, and in an exceptionally dry season. The lumber was allowed to lie there a considerable time.

CARE IN EXTINGUISHING FIRE.

If the plaintiff becomes aware that the engine of the defendant has caused a fire, e. g., in a dry stump which may inflame other combustible material, and finally damage his own property, he is probably under a duty to attempt to extinguish the fire, or at least to confine it, and, if he endeavors thus to extinguish or confine it, to exercise proper care and skill in doing so. Not knowing of the fire e. g., in the stump, he would be under no duty in regard to it, "but knowing of it, he was bound to take all reasonable and practicable measures to prevent its spreading to his lumber. He was not an insurer. The measure of his duty in this regard, was reasonable care and diligence"[50]. Smoke, in this case, was seen by the plaintiff, to be issuing from a rotten stump near which was some dead grass. He sent an employe to put it out, who, on his return said he had put it out. No smoke was seen after that until the next day, about 10 o'clock, when another employe was sent to look after the fire. Finding the stump burning about the roots, he threw water on it until he thought the fire extinguished. He remained there nearly three-fourths of an hour, to satisfy himself. About noon the wind arose, and a fire broke out near the stump, which could not be controlled, on account of the wind and the dryness of the weather. The fire advanced into the neighboring tract, destroying the plaintiff's lumber lying there. A judgment for the plaintiff was affirmed.

FIRES OF WHAT SORTS.

The things for the combustion of which the railroad company has been held responsible, are numerous and various, e. g., a barn,[51] a house,[52] a saw-mill and lumber,[53] fences, trees and timber,[54] sash and door mill,[55] timber-land,[56] logs and lum-

[50]Haverly v. State Line R. R. 135 Pa. 50.

[51]Pa. R. R. v. Stranahan 79 Pa. 405; Pa. R. R. v. Page, 21 W. N. 52; Van Steuben v. C. R. R. N. J. 178 Pa 367; P. & R. R. v. Hendrickson, 80 Pa. 182; Matthews v. P. & L. E. R. 18 Super 10.

[52]Erie R. R. v. Decker, 78 Pa. 293, Huyett v. P. & R. R. 23 Pa. 373; Pa. Co. v. Watson, 81½ Pa. 293.

[53]Albert v. N. C. R. R. 98 Pa. 316.

[54]R. R. Co. v. Yeiser 8 Pa. 366.

[55]Henderson v. P. & R. R. 144 Pa. 461.

[56]Thomas v. N. Y. etc. R. R. 182 Pa. 538; Stevenson v. Pa. R. R. 20 Super 157.

ber,[57] a public school house,[58] hay in a meadow,[59] woodland, rails and timber,[60] a turnpike bridge,[61] fences, grass and wood,[62] store house for coal and straw,[63] ice in the ice house.[64] The lessee of a hotel burnt by the defendant may sue for the destruction by fire of his furniture and liquors.[65] A, who has a contract with the owner of a tract of land, upon which timber is growing, to manufacture the timber into lumber, for a share of the lumber, may sue for the destruction by fire of the lumber which he has manufactured, and which is lying upon the tract.[66] When the owner of the property burnt brings an action for the damages, which ends in a compulsory nonsuit because of the contributory negligence of the owner, an insurance company which has paid him $1,000 on account of the loss cannot afterwards bring another action in the name of the owner to its use. Only one suit could be sustained.[67]

WHO DEFENDANT.

The defendant is ordinarily the company on whose road the fire occurs. But if it has leased the road, and the lessee is operating it when the fire occurs, this lessee will be liable for the loss, and therefore is the proper party defendant.[68]

MEASURE OF DAMAGES.

When damages for the destruction of a house by fire are claimed, the jury in estimating the value of the house, may properly hear and consider evidence as to its rental value, as to its age and condition, but not what it would cost to rebuild it[69]. A barn having been burned, the plaintiff testified as to

[57]Haverly v. State Line R. R. 135 Pa. 50: Post v. Buffalo etc. R. R. 108 Pa. 585; L. V. R. R. v. McKeen, 90 Pa. 122.

[58]School District v. Pa. R. R. 26 Super 112.

[59]Jennings v. Pa. R. R. 93 Pa. 337.

[60]P. & R. R. v. Schultz, 93 Pa, 341.

[61]Turnpike Co. v. P. & T. R. R. 54 Pa. 345.

[62]Pa. R. R. v. Hope, 80 Pa. 373.

[63]Pa. R. R. v. Lacey 89 Pa. 458.

[64]Ice Co. v. W. & W. R. R. 14 W. N. 554.

[65]Pa. R. R. v. Kerr, 62 Pa. 353.

[66]Haverly v. State Line R. R. 135 Pa. 50.

[67]Post v. Buffalo etc. R. R. 2 Walker, 464.

[68]Pa. & R. R. v. Hendrickson, 80 Pa. 183; P. & R. R. v. Shultz, 93 Pa. 341; Van Steuben v. Central R. R. of N. J. 178 Pa. 367.

[69]Pa. Com. v. Watson, 81½ Pa. 293.

its age; that the roof was of shingles, and was in good condition; also as to the contents that had been consumed[70]. The lessee of a hotel being plaintiff, he claimed damages for the destruction of his personal property in the hotel, also for the loss of his gains and profits which he would have made, had his use of the premises not been interrupted, and for the expenses of removal. He subsequently withdrew the latter part of the claim.

EFFECT OF INSURANCE.

The existence of insurance upon the premises destroyed or injured is irrelevant, and for that reason, cannot be proved by the defendant. The receipt of the insurance money will not diminish the damages for which the defendant is liable to the plaintiff[72]. The taking of the insurance cannot be shown, as indicative of the plaintiff's sense of the danger to his barn from the operations of the railroad[73]. In one case, ice having been insured, the action for its destruction, against the railroad company was brought by the owner, to the use of the insurance company[74]. That insurance money has been received by the plaintiff, cannot be proved, in order to remove from the jurors any sympathy for the plaintiff that they might feel[75].

[70]P. & R. R. v. Hendrickson, 80 Pa. 182.

[71]Pa. R. R. v. Kerr, 62 Pa. 353.

[72]Pa. R. R. v. Hendrickson, 80 Pa. 182; Wilson v. P. B. & W. R. R. 9 Del. 505. In the latter case the defendant was not allowed to show that the plaintiff had received from the insurance company $3500.

[73]Pa. R. R. v. Hendrickson.

[74]Kennebec Ice etc. Co. v. W. & N. R. R. 14 W. N. 554. After a nonsuit of the owner, for contributory negligence, another action cannot be brought in his name to the use of the insurance company. Post v. Buffalo etc. R. R. 2 Walker, 464.

[75]Wilson v. P. B. & W. R. R. 9 Del. 505.

MOOT COURT.

COMMONWEALTH v. CHARLES YOKEL.

Imprisonment for Debt. Criminalizing Violation of Contract. Constitutional Contract.

Yokel contracted to labor on X's farm for 1 year for $200, which was payable in advance in quarterly installments of $50. A statute declares that if a farm laborer paid in advance deserts his work he shall be guilty of a misdemeanor. Yokel deserted his work immediately upon receiving the second installment. This is an indictment for the misdemeanor. He alleges that the act violates both the federal and the state constitutions.

FETTERHOOF, attorney for Plaintiff.

BRANCH, attorney for Defendant.

OPINION OF THE COURT.

JONES, J:—Yokel, the defendant in this suit, alleges that the statute under which he is indicted violates both the federal and state constitutions. The statute declares that, if a farm laborer, paid in advance, deserts his work, he shall be guilty of a misdemeanor. When a man contracts to work on a farm, for which labor he receives money in advance, he, thereupon, becomes indebted to the landlord for the amount of such advancement. This debt is to be liquidated by his rendering personal services; and, if the laborer refuses to render such services, he remains the landlord's debtor until the performance of the conditions of the contract, and if he stoutly refuses to work at all, or in so many words refuses to pay his debt, the state would then imprison him under this statute in question. It is simply a means whereby one may be imprisoned for debt. Article I Sec. 16 of our State Constitution provides that, "The person of a debtor when there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law." Unless, therefore, there is a strong presumption of fraud, this statute directly violates the foregoing provision of the State Constitution. So it becomes necessary for us to consider what constitutes fraud on the part of the one refusing to labor. We understand that nothing less than an attempt to defraud a creditor, and such action to be in bad faith, is the meaning of the word fraud as used in this section of the constitution before referred to. Surely the wilful refusal to work, alone, is not fraudulent. 60 S. E. Reports 20, Ex parte Hollman. Since it appears the services which a farm laborer is paid in advance to perform is, until the performance of the service, a debt owing the landlord by the laborer and that a mere refusal by the laborer to work after receiving a payment is not a fraudulent attempt to avoid payment of the debt, we, therefore, declare that a statute which provides punishment for the non-performance of a contract for personal services in the business of another, for which services money has been paid in advance, is unconstitutioinal, being in violation of Art. I Sec. 16 Pa. State Constitution. 60 S. E. Rpts. 20, supra.

It is provided by Article XIII Sec. 1 of the Federal Constitution that, "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." In considering violations of this provision, we are confronted by the natural question, "what is involuntary servitude?" Mr. Justice Harlan in defining involuntary servitude, in Robertson v. Baldwin 165 U. S. 275, says, "The condition of one who contracts to render personal services in connection with the business of another becomes a condition of involuntary servitude from the moment he is compelled agains his will to continue in such service. He may be liable in damages for the non-performance of his agreement, but to require him, against his will, to continue in the personal service of his master is to place him and keep him in a condition of involuntary servitude." Under the statute in question, the farm laborer is given the alternative of suffering imprisonment for the non-payment of his debt or remaining in the private business of another and being compelled against his will to continue in such service. When once a laborer desires to quit his work and probably suffer an action for breach of his contract, any continuance of his service would, doubtless, be against his will. And,as we believe, that from the moment he is compelled against his will to continue in such service, he is in a condition of involuntary servitude, any statute which would promote such ends must necessarily violate the Thirteenth Amendment to the Federal Constitution. 60 S. E. 20, supra.

Moreover, we think, the statute violates Art. 14, Sec. 1 of the Federal Constitution and Art. 1 Sec. 17 of the State Constitution, in that it imposes unjust conditions upon the laborer which it does not impose upon the landlord. 60 S. E. 20, supra. It expressly states that if the laborer refuses to perform, he shall be guilty of a misdemeanor, while the landlord may refuse to perform and not be subjected to criminal prosecution. It also requires that in order to make the refusal to perform indictable, the laborer must have received money in advance. Is it just to impose imprisonment upon a laborer who refuses to work after he has received money in advance, although he would willingly and gladly make restitution for the amount advanced, and at the same time permit the landlord to break the contract at any time and be liable only in a civil suit? Might not such a law work great hardship where a man is compelled from some necessity to break his contract to labor, and even though he offers to return the money advanced, the state will not suffer the release of his obligations.

Surely such a law which advocates imprisonment for debt, which tolerates involuntary servitude and which imposes harsh obligations on one party to a contract, cannot be otherwise than unconstitutional; and since it is unconstitutional, the defendant cannot be convicted under it.

OPINION OF THE SUPERIOR COURT.

The act under which Yokel is indicted,, is supposed to violate the 16th section of the 1st Article of the Constitution of the state. That section ordains "that the person of the debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be presented by law." Yokel's act has been declared a crime, and subjected to an imprisonment, the term of which is not liable to abridgement by the cession of

all his property. He may already have no property, or, the day after his conviction, he may assign it to a trustee for his creditors. Nevertheless he may be compelled to remain in durance until the normal expiration of the sentence.

It may be seriously doubted whether a "debtor," in the sense of the constitution is any body other than one who owes a sum of money. Imprisonment for debt in England and the colonies had been imprisonment for non-payment of money. Yokel was not a debtor in this sense. He owed, not money, but service. He might however be sued for the non-performance of his contract, and in such suit, the money equivalent, to the employer, of his services would be recovered. To hold that he could be imprisoned simply for not paying the judgment thus recovered, would be to put an interpretation all to narrow upon the words of the Constitution. Cf. Com. v . Dee, 14 Super 640. Nothing indicates that the failure of Yokel to do the work. was fraudulent. He may have been physically disabled; sickness or calamity in his family may have induced neglect of performance The word "desert" is entirely too elastic to justify an inference that there was any fraud in the conduct sought to be defined by it. If payment of a money-judgment for damages could not be constitutionally enforced by imprisonment, specific performance of the contract ought not to be so enforceable. We think they may not be so enforced.

It must be noted that the crime is not that of contracting a debt without reason to believe in one's ability to pay it, *e. g.* when one is conscious of insolvency. Com. v. Sponsler, 16 Pa. C. C. 110; 170 Pa. 194. That might be considered a fraud, and as such punished. No fraud can be seen in the mere fact that, after engaging for a consideration to work, A does not work. Cf. Wilson v. Talheimer, 20 Pa. C. C. 203. We accept the view of the learned trial court, that the act under which Yokel was tried, was a violation of the state constitution.

Does the act in question violate the 13th amendment to the constitution of the United States? That amendment declares that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." When A contracts to do service for B, for a compensation, A is not a slave, although he may be subject to physical coercion, in order to secure his performance of the contract. Nor is he in involuntary servitude, if the opinion of Brown J. is to be received, Robinson v. Baldwin, 165 U. S. 275. He thinks (p. 280) that a servitude that begins with consent, cannot be deemed "involuntary." This view however, we must probably discard, for the anti-Peonage statute of Congress of 1901, which forbids the relation of peonage, a relation founded in voluntary contract, and which has been assumed to be constitutional, Peonage Cases, 123 Fed. 671; Clyatt v. United States, 197 U. S. 207, finds no warrant save in he 13th Amendment. Peonage must be then either slavery or involuntary servitude. "Peonage" says Brewer J. "is sometimes classified as voluntary or involuntary, but this simply implies a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The

other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude." Clyatt v. United States *supra.*

Is the annexation by the law of disagreeable consequences to the breach of a contract, for personal services, the establishment of "involuntary servitude." A contracts to make a wagon for B. He fails to make it. B sues him and obtains damages. Is it not clear that, if these damages were not recoverable, A would be less constrained to perform his contract, than he now is? His foresight of the judgment and of the seizure in execution, of his property, deters him from doing what he otherwise would do. Suppose the law made the damages not only compensatory but punitive. Since A's loss would now be greater, should he commit default the duress upon him will be more sensible. Is the exercise by the law of this sort of pressure on the contracting party, a subjection of him to servitude? Now, while the anticipatory loss of one's property exercises a degree of coercion upon him, the anticipatory loss of his personal liberty by confinement in jail, or by fine, may exercise a higher degree of it. The fine may be larger than the damages however exemplary, in a civil suit, would be. The imprisonment may be more formidable than the loss of all one's property. When the law passes from the coercion by damages to that by fine or imprisonment, does it pass from an act consistent with liberty, to an act which is equivalent to the creation of involuntary servitude? Is constraining by taking away one's property not interfering with liberty, but constraining otherwise, reducing to servitude?

A has agreed to work for a year for B. If he breaks his contract, B can take his property, by execution, if he has any. He therefore, though very unwillingly, continues to work. He is not in servitude. Now let us suppose that, if he breaks his contract, he may be imprisoned for three months by the state, at the prosecution of B. The fear of this imprisonment equally constrains him, though very reluctantly, to do the work. Is he, in doing this work, in the latter case any less free than he was, in the former case?

Does the service's being an "involuntary servitude" depend on the *degree* of the compulsiveness of the consequences of non-performance? Then, since it may be that some persons would rather suffer the imprisonment than lose their property, a criminalization of the act would be less an establishment of involuntary servitude" than the subjection of the defaulter to the so-called civil consequences of loss of property by execution.

An able opinion of the Supreme Court of South Carolina, Ex parte Hollman, 60 S. E. 19 has held that a statute making criminal the refusal of a farm hand who has received advances from the employer, to perform the personal services which were the expected consideration for the advances establishes involuntary servitude. In so saying, it virtually says that the legislature cannot punish with fine or imprisonment, the violation of any contract. Performance of any contract, *e. g.* to build a house, to run a train of cars, to assist in the navigation of a ship, to make a coat, to work for a week in a mill, implies the employment of a man's bodily and mental powers, in certain modes, an employment which is inconsistent with their employment, at the same time, in other modes. We are unable to com-

mit ourselves to this enormous limitation of the powers of the states. The legislatures which adopted the 13th amendment could not have seen in it so severe a curtailment of those powers.

It may be that a law giving to the employer the power to apply direct coercion, of various sorts, at his own will, *e. g.* to whip the recusant employe, who stopped work, or the quality of whose work fell below the contract standard, to lock him up in a cellar, to withhold from him his food, etc., would be one giving effect to peonage, and be a violation of the 13th Amendment. We do not see such violation in the state's penalizing improper conduct of an employe, and enforcing the penalties as it enforces those for any other sort of crime.

But, the selection of the farm laborer for punishment for breach of his contract may be open to the objection that it improperly discriminates between him and other sorts of contracting parties, or between him and his employer. Into this question it is not expedient here to enter.

Judgment affirmed.

MARY TARBELL v. R. R. CO.

Action of Dower, unde nihil habet.

STATEMENT OF FACTS.

The railroad company intending to pass over the land of George Tarbell, husband of plaintiff, contracted with him for the right of way, paying him $1,000 for it. A week later he died, the one thousand dollars being still on deposit to his name in bank. The personal estate was just enough to pay his debts, and was used in paying them. Six months after his death, his widow brings this action of dower unde nihil habet.

MOYER for the Plaintiff.

MILLER for the Defendant.

HIBBS, J.—It is well settled that a Railroad Company has the right of eminent domain, and this because it exercises a public function, a railroad being a highway for the public use. The act of Feb. 19, 1849, entitled, "An act for the Regulation of Railroads," in Section 11, provides the manner in which private property is to be taken by a railroad. First the Company must try to agree with the owner upon the compensation to be paid, Reitenbaugh vs. The Chester Valley Railroad Company, 21 Pa. 100, and if this fails, then the Railroad Company may resort to condemnation proceedings in which seven viewers are appointed to assess all damages that are ascertainable at the time of the taking, the amount of which the Company must pay to the owner, and having paid it, the company takes the land for the purposes of a railroad with a clear title. And the title which it takes by the exercise of the right of eminent domain, is well settled to be an easement, and when the land for railroad purposes is abandoned, it reverts to the owner. Western Pa. Railroad Co. vs. Johnson, 59 Pa. 290, Jessup vs. Loucks, 55 Pa. 350, Bean vs. Kulp, 7 Phila. 650, P. F. W. & C. R. R. vs. Peet, 102 Pa. 488. And as a consequence of the exercise of this right, the dower right of the wife or widow is defeatd. This is well settled. Tiedeman on Real Property, Sec. 102. Two reasons are given why dower is

defeated in such cases, first because the railroad takes only an easement, second, because all property is held subject to the paramount right of the State, and since dower is not result of contract, but the result of legislation, the State may defeat it.

And now the question for us to determine is, is the effect the same when the owner and the Company agree upon the compensation?

It is contended by the plaintiff that the railroad company takes the fee the same as does a natural person, and the wife not having joined in the conveyance, dower still attaches. We cannot agree with this contention. It is not the law generally, and we have not been able to find any Pennsylvania authority which sanctions such doctrine. On the contrary, we think the act of 1849 and the construction placed upon it, are against it. We have said that the act provides two methods by which private property is to be taken, one of which is to be tried first. Now the company was employing the first method ,when it agreed with Tarbell to pay him one thousand dollars. It was clearly acting by reason of the act of 1849, and this we infer from the fact that it "intended" to pass through Tarbell's land. Its purpose was to perform a public function. If this were not so it would not come within the act, and therefore could not take private property. And now, when it is acting under this act, and since no matter which method it employs, it is acting for the same purpose, namely to perform a public function,why would not the effect be the same in both cases. In other words, the cause of taking the land was the same in either case, whether it was taken adversely or amicably, and in either case it was taken by virtue of the same act. Now if the effect of taking the land under the one method of the act is that the Railroad Company takes an easement, why is it not also true that the Company takes an easement when it succeeds in employing the alternative method? If the Railroad Company ceases to use the land for Railroad purposes, does it not cease to exist under the Act of 1849, and why should not the land revert to the owner? We think it does. If like causes produce like effects then we say the Railroad Company takes an easement, and this whether it takes the land adversely or amicably so long as it takes it by virtue of this Act of Feb. 19, 1849. There being an easement in both cases, and dower being barred in the one, isn't it also true that it is barred in the other? We think it is.

The Plaintiff has cited Nye vs. The Taunton Branch R. R. Co., 113 Mass. 277, in support of his contention, but that case cannot effect this one. There it was understood the Railroad Company was to take a fee. A statute of Massachusetts provided that where there were no restrictions nor conditions, the Railroad Company was to take the fee. There is no such statute in Pennsylvania and therefore the doctrine of that case cannot apply We say too in this connection that the general rule is that where land is conveyed for the purpose of a highway, and it is not clear whether the grantor intended to convey an easement or a fee simple title to the land, the presumption is held to be in favor of the grant of an easement. Tiedeman on Real Property, Sec. 441.

We have not been able to find any Pennsylvania cases where a Railroad Company has been sued for dower, but Venable vs. the Wabash Western Maryland Company, 112 Mo. 103, is exactly in point. In this case the

husband conveyed land to the Defendant's assignors for the consideration of $1.00, the wife not joining. The question was a new one in that State, and the Court made a thorough investigation of the subject. After a careful review of the authorities of different States, as well as the opinions of able text-writers, it came to the conclusion that no matter how the Railroad Company got the land, whether by purchase, gift or judicial proceedings, it got only an easement and dower was defeated. This is supported by Chouteau vs. the Mo. Pacific R. R. Co., 122 Mo. 375, Baker vs. The A. T. & S. F. R. R. Co., 122 Mo. 396.

Therefore by reason and authority we think the law is that whether the land is taken by purchase or by condemnation proceedings, if it is taken under the Act of Feb. 19, 1849, the Railroad Company takes an easement and dower is defeated.

Judgment accordingly for the Defendant.

OPINION OF SUPERIOR COURT.

The opinion of the learned court below makes unnecessary an extended discussion of the question involved in this case.

The state may take any thing, land or chattel for a public use, on the condition that it makes compensation to the owner. It can take the entire use, or only a partial use of the thing, the fee in land or barely an easement. Whether it takes a fee, or merely an easement, it is bound to make compensation.

The compensation must be made to the person who owns the land or other thing taken. If there are tenants in common, each must receive it. Pittsburg etc. R. R. v. Hall, 25 Pa. 336. If one has a particular estate, and another a remainder, or reversion, the particular tenant must receive the value of his interest, and the remainderman that of his, Getz v. P. & R. R. R. 105 Pa. 547; Dyer v. Wightman, 66 Pa. 425; 5 P. & L. Dig. Dec. 8223.

After dower has matured by the death of the husband, the widow is regarded as having an estate in the land, and is entitled should the land be taken under eminent domain, to compensation; York Borough v. Welsh, 117 Pa. 174.

What is the nature of inchoate dower; that is, the right of the wife, prior to her husband's death, in respect to his land? We are told that it is neither an estate; nor an interest in the land. 14 Cyc. 925; She has in virtue of it, no right to the possession or control of the land. She cannot restrict the husband's power over it. He may improve it if he chooses, or he may remove from it its ore, its coal, its timber, the buildings upon it. Nevertheless, he could not by selling the land, deprive her of the chance of becoming a tenant for life of one third of it. In dealing with the vendee, he is not so far her agent that he can receive from the latter, the value of this chance, and extinguish it. She must do that herself. She may sell her inchoate right to her husband's vendee, for whatever price she chooses to take, but he cannot sell it, nor fix the price of it.

It ought not, apparently, to be important, whether the husband is selling his land voluntarily or under compulsion, for the determination of the question whether he is to have the power of disposing of her dower. The state can take his estate, paying him for it. It for the same reason, can

take the wife's right, paying her for it. If there were two tenants in common, the state would negotiate with each, for the amicable acquisition of their interests, and there would seem to be no particular objection to the state's negotiating with the husband for the purchase of his interest—which is qualified by the wife's right— and with the wife for the extinction of her qualifying right.

The inchoate right of the wife, however, is so wanting in dignity that it has been said to be capable of extinction by the state, without compensation. 14 Cyc. 884; Melizet's Appeal 17 Pa. 449; White, Constitution of Penna, 118. The state, favorably disposed to dedications of land to its use by their owner, may concede to the husband alone, the power of dedicating land so as to extinguish the right of his wife as dowress, and it may regard him as having the sole power to dispose of land for public use, for compensation, and treat a release executed by him alone, for a consideration paid to him alone, as extinguishing not his own right merely, but the inchoate dower of his wife. The legislation pertaining to railroads embodies this policy. A railroad company may negotiate with the married owner, alone and obtain for a price satisfactory to him, a release of a right of way. The release will extirpate the incipient dower, so that, after the husband's death, the widow can sustain no action for the assignment of dower; Arnold v. Buffalo etc. R. R. Co., 32 Superior, 402.

The court below has well justified its decision.

Judgment affirmed.

FLYNN vs. SAMBOLON.

Discharge of Sureties—Notice to sue Principal.

STATEMENT OF THE CASE.

Flynn held a note, joint and several, for $1000, of which Harris was the principal maker and Horner and Sambolon sureties. Horner's wife told Flynn that he should sue Harris, otherwise her husband would hold himself discharged. She, a week later, sent to Flynn a written notice of the same import. The notice was not acted upon by Flynn, for two years, during which time Harris died entirely insolvent. Flynn then brought separate suits against Horner and Sambolon. Sambolon alleges (a) the delay till Harris's insolvency discharged him; (b) the ignoring of Horner's notice discharged both Horner and Sambolon.

GARRETT for the plaintiff.

GRAYBILL for the Defendant.

OPINION OF THE COURT.

JACOBS, J.—It is well settled in Pennsylvania that one who is surety on a note or other obligation may give notice to the creditor to proceed against the principal debtor for collection of the debt, or he, the surety, will hold himself discharged. In such case, if the creditor disregards the notice and neglects to sue the principal until he has become insolvent the surety is discharged from his liability. This applies to the case of a single surety. This principle is upheld inLichenthaler v. Thompson 13 S. & R. 157; Wetzel v. Sponsler 18 Pa. 460; Strickler v. Burkholder 47 Pa. 476; Tenant v. Tenant 140 Pa. 485 and in Cope v. Smith 8 S. & R. 111.

The Act of May 14, 1874, P. L. 157 Ses. 1, provides that: "The sureties or surety in any instrument in writing for the performance or payment of money at any future time shall not be discharged from their liability upon the same, by reason of notice from the surety or sureties to the creditor or creditors,, to collect the amount thereof from the principal in said instrument, unless such notice shall be in writing and signed by the party giving the same."

There is no question that as to the surety, Horner, the notice was sufficient and such as complied with the terms of the statute, for the oral notice given by the wife is supplemented by a written notice from Horner himself, saying that he will hold himself discharged if Flynn does not sue Harris. Clearly then Horner was discharged. But did the ignoring of Horner's notice discharge both Horner and Sambolon, as claimed by the defendant?

The release of a principle debtor will discharge a mere surety, but the release of one co-surety will exonerate the other only to the extent which the releasee would otherwise be compelled to pay. Shock v. Miller 10 Pa. 401.

Flynn by his laches in ignoring the notice of Horner, the co surety, and neglecting to bring suit against Harris the principal until it was too late indirectly released Horner. It would be highly inequitable to hold that he may now bring suit against Sambolon and recover the whole amount of the note, since, by the release of Horner, Sambolon has lost his right of contribution from Horner and could not thus reimburse himself were he compelled to pay the whole debt. We therefore hold that Sambolon, who is not a party to the notice to Flynn is discharged to the extent of five hundred dollars, the amount he might have collected from Horner, if he had been called upon to pay the whole; or which Horner might have collected from him, had Horner been called upon to pay the note.

There is a presumption that Harris was solvent when notice was given to Flynn and that a recovery could have been had from him. This presumption Flynn has not attempted to overcome.

Judgment is hereby rendered for the plaintiff in the sum of five hundred dollars.

OPINION OF SUPERIOR COURT.

Neither the delay of Flynn for nearly two years, nor the delay coupled with the insolvency of Harris, would have discharged the sureties 20 P. & L. Dig. Dec. 35590.

The notice was in writing. It emanated from Horner. It was explicit that, unless Flynn sued Harris, he Horner, would hold himself discharged. This notice, put on Flynn the necessity, in order to maintain his right of action against Horner, to sue within a reasonable time. He did not sue for two years.

Flynn might nevertheless recover from Horner, if he showed that had he sued Harris, he could not have recovered anything. Gardner v. Ferree, 15 S.&R. 28; Walker v. Hoch, 25 Pa. But the burden was upon Flynn to show this, if it was not shown by the defendant. Neither he nor the defendant having shown it, it must be assumed that the money could have been recovered. Strickler v. Burkholder, 47 Pa. 476. Horner is therefore discharged.

But, if Horner is discharged, does it follow that Sambolon is? Some courts have held that notice by one surety to the creditor to sue the principal debtor, must be treated as notice for both sureties. A majority of the courts seem to hold the contrary, Child's Suretyship & Guaranty, 197. Horner's notice did not purport to be on behalf of Sambolon and himself. It follows that the notice discharges Horner, but not directly Sambolon. But, it would be a harsh result to hold that Sambolon's ultimate liability must be increased because of his inaction. To avoid this, it is necessary to hold as does the learned court below, that Sambolon is discharged to the extent to which he has lost the right of contribution from Horner. Had Horner not been discharged, he would have been obliged to repay to Sambolon one half of what the latter paid to Flynn. This half he cannot now be compelled to pay, without nullifying the effect of Flynn's disregard of his notice.

Judgment affirmed.

BOOK REVIEW.

Ideals of the Republic, by JAMES SCHOULER, Little, Brown & Co. Boston, 1908.

The writer of these lectures is well known as a historian of the United States, as a writer of a number of approved law books, and as a lawyer of distinction. The nature of the book is best exposed by the names of its leading chapters: The rights of human nature; types of equality; civil rights; political rights; government by consent; written constitutions; a union of states; the discipline of liberty; three departments of government; parties and party spirit; servants of the public; the strife to surpass; and a new federal convention. By so staid a writer one is somewhat startled to find a quasi-defense of lynching, p 69, and the assurance that it has "almost invariably" happened that the innocent have escaped punishment. Almost equally surprising is the apology for subjecting those accused of crime to inquisition, and one of the reasons for it, viz: heaven will hereafter call on every one "to answer out of his own mouth for his course of life" seems peculiar. The author assures us that though the right of petition to the government is secured to us, it is a right "not to demand, but to ask deferentially." Laudator of the existing arrangements of the state as is, generally the author, he is nevertheless a friend of the initiative and the referendum. In these institutions he sees "an engine for popular rule of splendid possibilities." That government should rest on the consent of the governed is a favorite tenet, the inconsistency of which with any government at all, if logically applied, the learned author does not seem to perceive. The censure of the automobile as widening class jealousies (p. 273,) is remarkable. The lectures are interesting patriotic, not too profound, not ostentatiously philosophical. Young thinkers on politics will find them congenial.